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Combinations by employers to resist a strike for increase of wages are held by the Supreme Court of Pennsylvania in Cole v. Murphy, to be as lawful as combinations by employees to obtain an advance in wages. The point expressly decided was that where employees enter into a lawful combination to control by artificial means the supply of labor, preparatory to a demand for an advance in wages, a combination of employers to resist such artificial advance is also lawful. It appeared that a combination of employers prevented dealers in the supplies used by such employers from selling to an employer who was not a member of this combination and who had conceded a demand of employees, by informing such dealers that no member of the combination would buy from them if they sold to such employer. It was held that this did not constitute unlawful coercion. The court ruled that at the common law, either combination would have been an unlawful conspiracy, because affecting the price of commodities as regulated by the relation of supply to demand. Statutes in Pennsylvania, and to some extent elsewhere, have sanctioned such combinations by workmen to obtain by persuasion and reason an increase of wages. Although employers are not included within the terms of these statutes, the court holds that members of a building trades association who, because other persons not members of their association indirectly assisted striking employees by selling materials to firms who had acceded to the strikers' demands, declared a boycott against these persons, are not guilty of an unlawful conspiracy, and hence not liable for damages ensuing to the boycotted persons. The reason for the common law fails, the court said, because the members of the association were not combining to depress wages, but to resist an artificial increase having no dependence on the relation of supply and demand, but caused by a combination, by statute not unlawful.

An interesting feature of the opinion is the assertion and discussion of the proposition that an act which, if performed by an individual, may be lawful, if committed by a combination of persons may be unlawful and actionable. This principle has been generally recognized in these industrial litigations, though the contrary was asserted in Bohn Manufacturing Co. v. Hollis, in the Supreme Court of Minnesota (55 N. W. Rep. 1119). 37 Cent. L. J. 291. In that case it appeared that a large number of retail lumber dealers formed a voluntary association, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard, and provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, their secretary should notify all the members of the fact. The plaintiff having made such a sale, the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association. It was held not actionable, and no ground for an injunction. The decision of the Pennsylvania court seems entirely fair and just. Its meaning in plain words is that it is a poor rule that will not work both ways, and that when labor organizations appeal to the law makers for some special provision in their interest they must not complain if the courts extends the same protection to employers.

According to a recent decision of the Court of Appeals of New York (People v. Moses, 35 N. E. Rep. 498), a person fishing on Sunday is guilty of a misdemeanor under the Penal Code though he does it on his private grounds. It appeared that the fishing complained of was done in a pond belonging to a club of which defendant was a member. The court pretended simply to construe the statute. Fishing, they say, is absolutely prohibited on Sunday everywhere and under all circumstances. Three of the judges of the court dissented and properly so, we think. It is difficult to say where the interference with private rights may end if the power be now finally recognized to prohibit a man from performing an act, innocent in itself, on privately owned premises, which in no substantial sense constitutes a nuisance or disturbance, simply because it is repugnant to the sectarian sensibilities or ideas of Sunday propriety of

passers-by. Conceding that the majority of the Court of Appeals correctly interpreted the legislative intention, we believe that the absolute prohibition of fishing on Sunday everywhere, and under all circumstances, is not a legitimate exercise of the police power. The *New York Law Journal* concludes a lengthy and vigorous criticism of the view of the court, in the following language: "We submit that fishing may be a quiet orderly amusement, not requiring the services of others, and that the prohibition of fishing on Sunday everywhere and under all circumstances is, under the above test, repugnant to American constitutional law. It is possible that the three members of the Court of Appeals who dissented in People v. Moses, did so on constitutional grounds, and that their dissenting opinions would have marked a significant growth of judicial sentiment towards the adoption of the rule for determining the constitutionality of Sunday laws laid down by Professor Tiedeman."

NOTES OF RECENT DECISIONS.

BAILMENT—SPECIAL DEPOSIT—LIABILITY OF BAILEE—NEGLIGENCE.—In Gray v. Merriam, 35 N. E. Rep. 810, decided by the Supreme Court of Illinois, it appeared that United States bonds deposited by plaintiff with the defendants' bankers as a special deposit were stolen by defendants' cashier, who had access to them for the purpose of cutting off the interest coupons as they fell due. A year before the theft, defendants had notice that the cashier was speculating in grain, and they did not forbid his doing so. It was held that the defendants were guilty of such gross negligence as to make them liable, although they were mere gratuitous bailees, and that in an action for damages on account of such negligence, evidence that the bonds had been pledged as collateral security for loans made by defendants to plaintiff at various times before they were stolen is competent to show the relation of the parties to each other and to the bonds, in order to determine what would constitute reasonable care, though, at the time of the theft, all such loans had been paid. Magruder, J., says:

It is claimed by plaintiff in error that the defendant bankers were gratuitous bailees, holding the bonds in controversy as a special deposit for safe-keeping without reward. The general rule is that a gratuitous bailee is liable only for gross negligence. Story, Bailm. (9th Ed.) §§ 62, 70; Schouler, Bailm. (2d Ed.) § 35; Skelly v. Kahn, 17 Ill. 170. The instructions for both plaintiff and defendants require the jury to find that the defendants were guilty of gross negligence in the keeping of the bonds, as a condition to the right of recovery. But the objection made to plaintiff's instruction is the definition which it gives of gross negligence in the use of the following clause: "The want of ordinary and reasonable care is in law termed 'gross negligence.'" Gross negligence has been defined to be the absence or want of slight care or diligence. Story, Bailm. §§ 62, 64; Schouler, Bailm. §§ 15, 35; Railroad Co. v. Carrow, 73 Ill. 348; Railroad Co. v. Johnson, 103 Ill. 512. But the portions of the instruction which precede and follow said clause are in harmony with much of the language used in the text-books and decisions. Schouler, in his recent work on Bailments and Carriers (section 35), after announcing that the gratuitous bailee is liable only for slight care and diligence, according to the circumstances, and cannot be held for loss or injury grossly negligent, says: "This statement of the rule, though strongly buttressed upon authority, fails at this day of universal approval in our jurisprudence. · · · 'Slight,' 'ordinary,' and 'great,' are terms they [some courts] wish to see discarded, and they prefer judging of each case by its own complexion." The same author states that, in the main, gross negligence is a question of fact upon all the evidence for the jury, and that what constitutes slight diligence or gross negligence will depend in each case upon a variety of circumstances, such as the occupation, habits, skill, and general character of the bailee, and local custom and business usage. Schouler, Bailm. §§ 49, 50. Story, after stating the rule that, when the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, subsequently adds that in every case good faith requires a bailee without reward to take reasonable care of the deposit; "and what is reasonable care must materially depend upon the nature, value, and quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence and particular dealings of the parties." Story, Bailm. §§ 23, 62. In Smith v. Bank, 99 Mass. 605, which was an action against a bank for the conversion or loss by gross negligence of valuable articles deposited with it as a bailee without hire, the court said: "This was a gratuitous bailment. The defendants are liable only for want of ordinary care." A deposit is a naked bailment of goods to be kept for the bailor without recompense, and to be returned when the bailor shall require it, while a mandate is a bailment of goods without reward, to be carried from place to place or to have some act performed about them. Story, Bailm. §§ 4, 5. But a mandatory, like a depository, is said to be bound only to slight diligence, and responsible only for gross neglect Story, Bailm. § 174. In Skelly v. Kahn, *supra*, we held that "a mandatory or bailee who undertakes, without reward, to take care of the pledge, or perform any duty or labor, is required to use in its performance, such care as men of common sense and common prudence, however inattentive, ordinarily take of their own affairs, and they will be liable only for bad faith or gross negligence, which is an omission of that degree of care." The liability of banks, acting as bailees without reward in the case of special deposits has been recently considered in the case of Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. Rep 162, and it was there held that such bailees are

bound to exercise such reasonable care as men of common prudence usually bestow for the protection of their own property of a similar character; that the exercise of reasonable care is in all such cases the dictate of good faith; and that the care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. Gross negligence, as applied to gratuitous bailees, is defined in that case to be "nothing more than a failure to bestow the care which the property in its situation demands;" and the court further says: "The omission of the reasonable care required is the negligence which creates the liability, and whether this existed is a question of fact for the jury to determine." In the light of these more liberal views as to the liabilities of bailees without reward, we think that the clause in question, when considered in connection with the rest of the instructions, could only have been understood by the jury as referring to the want of such ordinary and reasonable care as was designated in the previous part of the instruction; that is to say, the care usually and generally deemed necessary in the community for the security of similar property under like circumstances. The rule that a gratuitous bailee is responsible only for the want of care which is taken by the most inattentive cannot be applied to all cases of bailment without reward. When securities are deposited with banks accustomed to receive such deposits, they are liable for any loss thereof occurring through the want of that degree of care which good businsss men should exercise in keeping property of such value. Bank v. Zent, 39 Ohio St. 105; 16 Amer. & Eng. Enc. Law, pp. 160, 206.

But if it be conceded that the definition of gross negligence in the clause above quoted, even when considered in connection with the balance of the instruction, is technically inaccurate, it does not follow that plaintiff in error is entitled to a reversal of the judgment in this case. A judgment will not be reversed for error in an instruction when it appears affirmatively that the defeated party was not injured by the error. The absence of such injury is clearly manifest when the undisputed evidence establishes the correctness of the verdict, so that, either with or without the erroneous instruction, the verdict could not have been otherwise than it was, and, had it been otherwise, would have been set aside by the court. Hall v. Sroufe, 52 Ill. 421; Burling v. Railroad Co., 85 Ill. 18; Hubner v. Feige, 90 Ill. 208; Railroad Co. v. Warner, 108 Ill. 538; Rolling-Stock Co. v. Wilder, 116 Ill. 100, 5 N. E. Rep. 92; Town of Wheaton v. Hadley, 131 Ill. 540, 23 N. E. Rep. 422. The defendants in this case did a regular banking business. The plaintiff kept a deposit and check account with them. He borrowed money from them from time to time, and authorized them to hold the bonds in question as collaterals to secure the notes given for such loans. While the bonds were thus held as collaterals, the character of the bailment was changed from a bailment for the exclusive benefit of the bailor to one for mutual benefit of the bailor and bailee. Preston v. Prather, *supra*. In ordinary cases of special deposits without reward, the banker has no right to handle or examine the property except so far as its safety may require. But here the bankers had access to the package containing the bonds, and detached the interest coupons when they fell due, and collected the interest, and deposited it to the credit of the plaintiff, to be checked out by him in the regular course of business. Bank v. Graham, 100 U. S. 699; Whitney v. Bank, 55 Vt. 154. Ker, the assistant cashier of the bank, stole the bonds in the summer of 1882. He had access to these bonds, and to the other special deposits kept by the bank in its vault. About a year before he absconded, Kean, the chief officer of the bank, had his attention called to the fact that Kerr was speculating upon the Board of Trade in Chicago, and a conversation upon the subject with him. Kerr was not known to have any other property than his salary of $1,800. He was, however, allowed to retain his position in the bank, and no effort was made to verify the truth of the statements made as to his speculations, and no examination was made to ascertain whether he was using moneys which did not belong to him. About two months before he absconded, the subject of his speculations was again called to the attention of the chief officers of the bank through an anonymous communication, and Kean had a second interview with him in relation to his conduct in this regard. "The defendants then entered upon an examination of the books and securities, but made no effort to ascertain whether the special deposits had been disturbed." Preston v. Prather, *supra*. The facts thus detailed are undisputed, and are established by the evidence of the defendants themselves. In Preston v. Prather, *supra*, an action was brought in the Circuit Court of the United States by parties in Missouri, doing business under the firm name of the Nodaway Valley Bank of Maryville, against the same bankers who are defendants in the present suit, to recover the value of United States bonds held as a special deposit, and stolen by the said Kerr about the same time when he appropriated the bonds in controversy here. The Prather case was tried by agreement before the federal circuit judge without a jury, resulting in judgment for the plaintiffs, and was taken afterwards to the Supreme Court of the United States, where the judgment rendered by the circuit judge was affirmed. The evidence in that case established substantially the same facts as are herein set forth. Those facts, which are here undisputed and supported by the testimony of the defendants, were there held by the Federal Supreme Court to constitute such gross negligence as to make the defendants liable for the loss of the bonds; the court saying: "As stated above, the reasonable care which persons should take of property intrusted to them for safe-keeping without reward will necessarily vary with its nature, value, and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody. Persons, therefore depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and thieves within, and that, whenever ground for suspicion arises, an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of these measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor. It was this view of the duty of the defendants in this case, who were engaged in business as bankers, and the evidence of their neglect, upon being notified of the speculations in stocks of their assistant cashier, who stole the bonds, to make the necessary examination

respecting the securities deposited with them, or to remove the speculating cashier, which led the court (below) to its conclusion that they were guilty of gross negligence. . . In this conclusion we fully concur." Inasmuch as the undisputed facts presented to the jury for their consideration on their trial below have been determined by the Supreme Court of the United States to amount to such gross negligence as will fasten liability upon a gratuitous bailee, we are disposed to hold that the verdict of the jury was right, independently of the error in the instruction, and that it ought not to be disturbed. Scott v. Bank, 72 Pa. St. 471.

PRIVILEGED COMMUNICATIONS OTHER THAN THOSE OF A PROFESSIONAL CHARACTER.

In a former paper the subject of privileged communications was discussed with reference to their professional character and their reception in evidence. It is proposed in this paper to discuss the subject with reference to the libelous or slanderous character of communications of this nature. There exists much conflict of authority upon the question of what shall be deemed communications of a privileged nature. This is no cause for surprise, especially in America, where each State has its own law of libel and slander, and its courts follow an independent line of adjudication based upon that law. The only rule anything like general in its application is that these communications which are dictated and controlled by a public necessity, or an individual duty or interest, and the element of malice is lacking, in the latter especially, are privileged and may not be actionable. This rule relating to the individual duty or interest as formulated in an old case[1] is "a communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminating matter, which, without this privilege, be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation." And an earlier case,[2] the court considered "a libelous publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty whether legal or moral or in the conduct of his own affairs." Where the public welfare or necessity is concerned, greater privilege, it would seem, should be given for the communication of information of a public nature and of such a character as to render knowledge of such matters a necessary essential to a perfect administration of the laws by the servants of the people. The people should not be kept in ignorance of what its servants are doing. The great manufacturing and supply concerns which feed the arteries of commerce and help to make busy the marts of trade should not be too much restricted in the effort to know more of their customers to whom credit is extended. The privileged communication is the exception to the rule, of course. The general rule being that the publication of matter of a libelous nature implies malice. The question of privilege becomes a question of law. If no malice can be shown to accompany the communication, the solution is easy.[3] And it is not so difficult to apply a rule to go by in the cases of communications made between persons both of whom are interested parties, or where the parties are related by blood or marriage, or in those cases where the information is solicited by a party having an interest in the subject matter, or in case the person giving the information has a legal duty to perform in making the communication. But where the duty is simply moral in its nature, no rule can be laid down. The reason for communications of a public nature being privileged is the accomplishment of the public good by a certain liberty of discussion and publication. But the rule would not extend to cases where the effect of the exercise of the privilege must necessarily result in public evil. There are cases, of course, where in a contest with public evils, existing or threatening, will warrant a freedom of speech, or publication in good faith, which may be injurious to private persons, while at the same time they have no remedy. The public welfare is paramount and the rights of individual citizens must be subordinated thereto. For convenience this subject will be discussed under three different heads, viz: Privileged Communications of a Private Character, Privileged Communications of a Public Political Character, and Privileged Communications of a Mercantile Character. Owing to the volume of authority touching the sub-

[1] Harrison v. Bush, 5 El. & B. 344.
[2] Toogood v. Speyring, 1 Comp. M. & R. 181.
[3] Press Co. v. Stewart, 119 Pa. St. 585; Bacon v. Mich. Cen. R. R. Co., 55 Mich. 224.

ject of communications in their libelous or slanderous character, it will be necessary to keep strictly within the intended limit of this discussion, *i. e.*, to discuss only such cases as bear directly on the question of privilege, excluding largely those cases where the court holds that the rule does not apply.

1. *Privileged Communications of a Private Character.*—The case of Byam v. Collins,[4] is of interest as presenting the "social and moral duty" phase of the question, although in this case the court found that the communications were not privileged so as to relieve defendant of responsibility. The facts in the case are interesting. Defendant had for a long time been on the most friendly terms with the *fiancee* of plaintiff. This friendly and intimate relation judging from the facts in the case had lasted up to a short time before the alleged libelous communications were made, when a coolness seems to have sprung up between the defendant and the *fiancee* of plaintiff because of these relations, we assume. Defendant having a dislike to Byam, and feeling as she says it was her moral duty to warn her friend in time, wrote a long letter to her in which she expressed her deep interest in and love for this friend of her bosom, upbraided her for not coming as she had been in the habit of doing for a long time, to the house of defendant, and besought the affianced of plaintiff whose name was Dora to have nothing further to do with the plaintiff or he would certainly wreck her life. Calls him an adventurer and asks, "is it possible that you know the character of that man? I know that if you did you would spurn him from your house and presence forever; and if you will but give me an opportunity of a personal interview with yourself, I will tell you a few truths, and as no one need fear the truth, that will open your eyes, and, perhaps save you from a long life of sorrow and regret." According to a well recognized rule in cases of this kind of interference, this letter came duly into the hands of him for whom it was never intended. Thereupon the troubles of the too solicitous Mrs. Collins began. Well, perhaps, might she wonder of Dora as did Lora in Childe Harold:

"Why did she love him?"

but further into the sentiment of Byron she did not go.

"Curious fool!—be still
Is human love the growth of human will?"

And the fair Dora, while, no doubt doing up her hair in "curl papers" preparatory to receiving the much abused Jo, sang to herself in the soft, sweet refrain of the poet Moore:

"I know not, I ask not, if guilt's in that heart,
I but know that I love thee whatever thou art."

Presumably, shortly after that interview between the lovers, one having the authority of a lawyer called upon defendant for the professed purpose of amicably adjusting the difficulty between plaintiff and defendant as it then stood. This lawyer gave Mrs. Collins to understand that he was a friend to her, and solicited her to talk to him as a friend. Defendant then told him in substance that plaintiff was a bad man, not fit to associate with decent people; that he had insulted a young lady by going into her room, and she had with a revolver, compelled him "to get down on his knees and beg of her to let him off." That he had gone to Canada with a woman in private, and was guilty of dishonest practices as a lawyer, was not to be trusted, and was altogether devoid of principle. These communications constituted the slander charged. It was divulged in the evidence at the trial that during the intimacy of Dora and Mrs. Collins, before the marriage of Mrs. Collins, however, that Dora had repeatedly requested defendant if she "knew anything about any young man she went with or in fact any young man in the place to tell her, because her father did not go out a great deal and had no means of knowing, and people would not be apt to tell him." Mrs. Collins had a brother, Dora had none. At this time plaintiff was unknown to any of them. The court holds that Mrs. Collins was not bound by any sense of duty in giving the information and Dora had not a sufficient interest in receiving it to make the communication privileged. In this connection the court uses this language: "She could properly tell what she knew about young men, but could not defame them, even upon request, by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true." This is very good, but the court undoubtedly assumed much from the evidence in arriving at its conclusion. Mr. Justice Danforth dissenting from the opinion of the majority maintains strongly that this case both upon the libelous and slanderous counts presents

fairly a case of privilege. Coming within the approved authority of Toogood v. Speyring, *supra*, and Harrison v. Bush, *supra*, in which last mentioned case it was held that this sense of duty must not be confined to legal duties which may be enforced by process, but must include moral and social duties of imperfect obligation. This same rule was adopted by the New York court in Ormsby v. Douglass,[5] and followed in Hamilton v. Eno,[6] so far as the count for slander is concerned there seems to be sufficient of both law and evidence for holding that these communications were privileged. They were made with no malicious intent. They were not voluntary, but drawn out by the solicitation of one who claimed to be acting as a friend of defendant, the counsel and attorney of plaintiff on a friendly mission as he expressed himself to defendant. Surely this might be regarded as coming within the reach, if only upon the assumption that Mrs. Collins regarded her interviewer as an adviser in the difficulty. While it is true this attorney of plaintiff's had no right to demand of Mrs. Collins that she repeat to him what she had heard, still under the particular circumstances of this interview it might seem that defendant was justified in unburdening herself.[7] The Supreme Court of Pennsylvania,[8] holds that a communication to be privileged must be made upon a proper occasion; from a motive and based upon reasonable or probable cause; when so made in good faith the law does not imply malice. Statements in an affidavit made in support of answer to be used in opposition to an application for an injunction, are privileged if pertinent to the issue.[9] And Folger, C. J., in Hamilton v. Eno, above referred to, says, "the occasion that makes a communication privileged is when one has an interest in a matter, or a duty in regard to it, or there is a propriety in utterance, and he makes a statement in good faith to another who has a like interest or duty, or to whom like propriety attached to hear the utterance." He quotes as authority, Van Wyck v. Aspinwall, 17 N. Y. 190; Klinck v. Colby, 40 N. Y. 427; Sunderlin v. Bradstreet, 46 N. Y. 191. It would seem as if the dissenting opinion of Justice Danforth in Byam v. Collins, is more nearly in accord with these earlier cases of same court, than is that of the main opinion. In the case of Kirkpatrick v. Eagle Lodge,[10] the report of a committee of a lodge of Odd Fellows recommending the expulsion of a member for false swearing, made in accordance with the rules and customs of the order, and published in a pamphlet account of the transactions of the lodge for the use of its members according to ordinary practice is *prima facie* privileged.[11] Publication of libelous matter by delivering it to an agent of the person to whom it relates who procures it at the latter's request for the averred purpose of bringing an action, is privileged.[12] Edwards v. Chandler,[13] is another case of alleged libel in a private communication by way of a letter. Chandler sued Edwards for damages alleging the writing of a libelous communication containing this language: "It is wondered at how can he live in more than ordinary style as he does, while having merely the honorable receipts of his agency to live upon." And also accusing him of vexatious acts, and of charging higher rates than were charged at other places. This communication was made by plaintiff in error to the general superintendent of the express company, for which defendant in error was agent. It was shown in evidence that the superintendent had previously requested the plaintiff in error to communicate with him in regard to defendant in error. The court, Justice Campbell, held the communication privileged. The court in this case also established the rule of pleading in these cases. Holding that where privilege is pleaded in defense, plaintiff must be prepared to prove not only the falseness of the communication, but also that the publication was dictated by malice. Chief Justice Campbell held in O'Connor v. Sill,[14] that the superintendent of schools had the right to have published a statement made by him severely criticising one who had been a teacher under him and had circulated reports

4 111 New York, 143, Am. St. Rep. vol. 7, 726.
5 37 N. Y. 477.
6 81 N. Y. 116.
7 See Hastings v. Lusk, 22 Wend. 410; also Howard v. Thompson, 21 Wend. 324.
8 Press Co. v. Stewart, 119 Pa. St. 585.
9 Hart v. Baxter, 47 Mich. 198.
10 26 Kansas, 384, 40 Am. Rep. 316.
11 See, also, Maurieas v. Worden, 54 Md. 233, 39 Am. Rep. 384.
12 See Howland v. Blake Mf'g Co., 31 N. E. Rep. 656.
13 14 Mich. 474.
14 60 Mich. 175.

detrimentary to his professional standing. A communication was held privileged where the matter related to personal character and was made in good faith for an honest purpose, by those concerned, and was made to the proper persons, even where the matter communicated is untrue, if made without malice.[15] A communication made to a superintendent of schools representing that a certain person proposed as a teacher was of bad moral character, and wholly unfit to teach and have the care of a district school, when made by those having an interest in the management of the school and unaccompanied by any malicious intent to injure, although the communication is in itself untrue is privileged says the Michigan Supreme Court in Wieman v. Maybee, *supra*.[16] This opinion is based upon the rule laid down in Harrison v. Bush, *supra*. Upon the question of privilege as to printed lists of discharged employees of a railway company, circulated at intervals among the agents of the company whose duty it is to employ such men as the company may need, where there is no undue publicity, the court maintains in the case of Bacon v. Mich. Cen. R. R. Co.,[17] that such lists come within the rule of privileged communications. In these cases the rule as established in Toogood v. Spyring, Harrison v. Bush, Edwards v. Chandler, Van Wyck v. Aspinwall, *supra*, and many others, is followed by the court although, Mr. Justice Campbell seems to be not entirely satisfied that this particular publication is privileged, since there was a good deal of doubt about the man's having done anything wrong. In the case of railway companys, public policy demands a strict account of their dealings with the public, and therefore personal rights must often suffer in the interest of the general welfare.

2. *Privileged Communications of a Public, Political Character.*—But a cursory examinations of the authorities will reveal the fact that a large proportion of the cases in which the question of privilege of communicating facts to the public involve the liberty of the press. And in this connection, Judge Cooley in his authoritative work on Torts, page 217, has this to say: "The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be, to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public are concerned. With this end in view, not only must freedom of discussion be permitted, but there must be exemption afterward from liability for any publication, made in good faith, and in that belief of its truth, the making of which, if true, would be justified by the occasion. There should consequently be freedom in discussing, in good faith, the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for a public office, either to the electors, or to a board or officer having powers of appointment." In the case of Express Print. Co. v. Copeland,[18] Copeland was a candidate for mayor. The libel complained of was as follows: "In 1881, T. P. Aplin died and Mr. Copeland was appointed administrator of his little estate valued at $2,579.90. The administration was closed in Nov. 23, and the report shows a total expense of administration of the estate of $2,579.90, to have been $882.28, and the administrator was allowed to retain the balance of the estate $1,777.62, subject to the order and instructions of the heirs. What such retention cost the heirs we do not know, but from the charges of administration it was doubtless a pretty heavy sum. The heirs no dotbt were afraid to give any instructions through fear that the balance of the estate would not pay the fees accruing for the money left in the administrator's hands." The court in this case held in substance that when a person consents to become a candidate for a public office, his character, is in issue, in so far as respects his qualification for the office and the public press may discuss his character with reference thereto, qualified by the pertinency of the matter of publication and that it is true, or there exists reasonable grounds for believing it to be true, and that good faith is shown in its publication.[19] Upon an official report by a public servant recommending a certain kind of street pavement,

[15] Meman v. Mabee, 45 Mich. 484.
[16] See, also, Foster v. Scripps, 39 Mich. 376.
[17] 66 Mich. 166.
[18] 64 Tex. 354.
[19] Bags v. Hunt, 60 Iowa, 251; Belnap v. Ball, 83 Mich. 584. See Com v. Clapp, 4 Mass. 169; Rearick v. Wilcox, 81 Ill. 177; Briggs v. Garrett, 111 Pa. 404; Mott v. Dawson, 46 Iowa, 533.

and intending by its official character to influence the public in its favor. The public has a right to discuss its merits fully. And if a newspaper discuss the report fully and fairly, with a view to the public interest and good, and without any malicious intent to injure the official, the criticism may be caustic, sarcastic and denunciatory in its character. It may expose misrepresentations and point out errors. But the private character of the official has nothing whatever to do with his report. A person in office does not enjoy any greater or different immunity than one trying to get into office. The statement concerning a city attorney that "he is unfit to hold the office of city attorney. His opinion is too easily warped for money consideration," spoken by the mayor to the city council, is privileged.[20] It is the law of most States that to accuse a candidate for public office of an offense against the law is not privileged. It would not be different where the charge is against one holding office. The freedom of criticism should be confined to fair comment upon the official acts of the person, and does not permit or justify, under the guise of this right, an assault upon his private character with which the public may have no interest. The imputation of base, unworthy or corrupt motives if not made in good faith, and, at least, without reasonable grounds for belief in its truth, would destroy the privileged character of the communication.[21] In the celebrated case of Maclean v. Scripps,[22] the leading question upon appeal was as to the privilege enjoyed by a newspaper of publishing extracts from other papers printed in another country severely reflecting upon the moral character of one of the leading surgeons connected with the University of Michigan. In this case by the holding of Justice Campbell, who wrote the opinion, and Cooley and Graves, one of the largest judgments ever recorded for damages in these cases, was affirmed. Justice Sherwood dissented. Defendant's plea among other things set up privilege resting upon the previous publication in other papers, of the charges not contradicted, and the privilege of the press to comment on the charges by reason of the connection of the plaintiff with a great public institution. Mr. Justice Sherwood in his opinion upon the question of privilege holds that "the charge concerned a public man in a high public position, in charge of most important public interests; those in which all of the people were interested. He was a public servant paid from the public funds; and the article concerns his conduct while in that service, which was a proper subject for public discussion and criticism, and I think the article was privileged within the law as expounded by this court."[23] The article was *prima facie* privileged and where no malice actual or legal is shown by plaintiff, or exists, defendant's privilege will be protected. The majority of the court found that the privilege was lost to defendant because of refusing to apply means of ascertaining whether reasonable grounds existed for the publication of the charges, and for willfully and wantonly publishing the defamatory charges, not for any good purpose or justifiable end.

Judge Cooley in Miner v. Detroit Post & Tribune Co.,[24] says in substance, in matters of violations of those important guaranties of the constitution such as personal freedom, and the requiring of excessive bail bonds, it is the privilege of the press to call attention, in a respectful manner of the public to the acts of the public official. It was held by the same court that a publication charging a deputy sheriff with arresting and handcuffing men without right and oppressing the poor and friendless, under color of his office, charges offenses against humanity and decency, which even if not crimes in themselves, should be so regarded when the court is asked to declare such publication privileged, and especially when shown to be untrue.[25] And again the Michigan court says when a man in this country becomes a candidate for office, elective or appointive, his character for honesty and integrity, and his qualifications and fitness for the position are before the public, the publication of the truth in re gard to such candidate is privileged of course; but the publication of that which is false is not protected.[26] Upon the question of a pub-

[20] Greenwood v. Cobbey, 42 N. W. Rep. 413.

[21] See Post Pub. Co. v. Moloney, 33 N. E. Rep. 921; Negley v. Farrow, 60 Md. 158; Hay v. Reid, 85 Mich. 296.

[22] 52 Mich. 214.

[23] See Atkinson v. Detroit Free Press, 64 Mich. 341.

[24] 49 Mich. 358.

[25] Bourreseau v. Evening Journal Co., 63 Mich. 431.

[26] Wheaton v. Beecher, 66 Mich. 310; see, also, Bronson v. Bruce, 59 Mich. 467; Hay v. Reid, 48 N

lic criticism of public officials, the court in a recent Pennsylvania case,[27] very clearly and concisely states what we believe to be the rule. The conduct of public officers is open to public criticism, and it is for the interest of society that their acts may be freely published with fitting comments or strictures. But a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives, or of criminal offenses, where such motives or offenses cannot be justly and reasonably inferred from the conduct. A man has no right to imputate to another, whose conduct is open to ridicule or disapprobation, base, sordid or wicked motives, unless there is so much ground for the imputation that a jury shall find not only that he had an honest belief in the truth of his statements, but that this belief was not without foundation." A somewhat more literal latitude is allowed, however, in the matter of petitions and memorials addressed to those having authority to redress the wrong complained of. These are, of course, *prima facie* privileged, and a strong showing of express malice must be made to defeat the privilege.[28] Candidates for any public office are subject to much the same rule of criticism as are public officials, and virtually the same rule as that laid down in Neef v. Hope, above cited, would apply subject to some minor variations.

3. *Privileged Communications of a Mercantile Character.*—Were the question of how much privilege should be enjoyed under this rule by mercantile agencies, left to the Georgia court they would get but scant consideration. A reference to Johnson v. Bradstreet Co.,[29] will be of interest. The Bradstreet Co., a well known institution of the country with main office in the metropolis of this country had circulated in Atlanta, where plaintiff resided and did business, as was its usual custom and agreement with its subscribers, certain reports of the financial standing of the business men of the country. This circulation by strict agreement is confined to the patrons of the association, and is done by all reputable agencies to further the business interests of the country, and to prevent fraud in the purchase of merchandise. In this particular case the statement alleged as libelous was partly printed and partly written, to the effect that plaintiff was drinking and failing in business, and again that he had not improved, and it would be well to watch him and be slow to trust him. Under the code the court says it was not privileged. That it was not a public duty in the performance of which this statement was circulated. It was not done in the performance of a private moral duty. Neither can it be called a private legal duty. Here is where the court erred we think. Of course, they assumed the falsehood of the charges. If the charges were with improper foundation in fact, there exists legal malice. If then under the Georgia code this kind of publication is not recognized as privileged *per se*, the court would be correct in its conclusion. Under Section 2980 of the code, statements made in the performance of a private duty, either legal or moral, are privileged. The court holds that the business of this agency was immoral and illegal, and consequently could not come within the code. We think the authority in Harrison v. Bush and Toogood v. Spyring, should have been applied by the court in this case. The New York court held in Sunderlin v. Bradstreet,[30] that a communication of this same character is privileged when made in good faith in answer to one having an interest in the information sought, or if volunteered, where the person to whom the communication is made has an interest in it, and the person by whom it is made stands in such a relation to him as to make it a proper or reasonable duty to give the information. And in this case the court, unlike the Georgia court of a later date, when it would seem as if the growth of the country's business would necessarily require a more liberal construction of a mercantile agency's privilege as required by that growth of its business interests concedes that defendants were engaged in an "entirely lawful and reputable" business. The New York court confined the publication and circulation of this kind of information to those particularly interested in knowing the credit and standing of a certain individual or firm. That the communication should be

W. Rep. 507; State v. Schmitt, 49 N. J. L. 579; Briggs v. Garrett, 111 Pa. 404.

[27] Neeb v. Hope, 111 Pa. 145.

[28] Harrison v. Bush, 5 El. & Bl. 344; White v. Nichols, 3 How. U. S. 266; Van Wyck v. Aspinwall, 17 N. Y. 190; Larkin v. Noonan, 19 Wis. 82.

[29] 77 Ga. 172, 4 Am. St. Rep. 77.

[30] 46 N. Y. 188, 7 Am. Rep. 322.

made in good faith and upon reasonably reliable information, in order that it should be regarded as privileged.[31] Defendants having been defrauded to a large amount of goods by persons with whom they had reason to, and did beleive, plaintiff to be associated, prepared and signed a paper stating that they, with others, had been "robbed and swindled" by plaintiff, and others, and agreeing to bear proportionately, the expenses of a criminal prosecution of plaintiff and such others. This paper was exhibited to an agent of one of the defrauded persons for signature. This was held to be a privileged communication.[32] So in the case of King v. Patterson,[33] it was recently held by the New Jersey court that a communication made by the proprietors of a mercantile agency in respect to the character and financial standing of a trader, is privileged, when made to those of its patrons who have a special interest in the information communicated. But this privilege does not extend to publications made to patrons who have no such interest in the subject matter.[34] In the case of Pollasky v. Minchener above, the court has this to say: "It was strongly urged upon us at the hearing that we should adopt the able opinion of Van Syckle, J., in which he dissents from the majority of the court in King v. Patterson, in which he goes the whole extent of giving immunity to commercial agencies for all publications made in good faith to their subscribers, whether true or false. In his desire to keep abreast of the progressive state of society, and the new and varying conditions that may arise in the progress of the age, he has entirely overlooked the rights of the individual." The court's conclusion is that a qualified privilege extends to all *bona fide* communications of this character, where the party communicating has an interest or duty to discharge to the recipient of the information, and embraces cases where the duty is not a legal one, but is of a moral or social nature, of imperfect obligation. Publication of extracts from the books of a county court of judgments, stating that judgments have been obtained against the persons named with a note appended stating that no distinction is made in the books between actions for debt or damages or properly disputed cases, nor is it known which remains unpaid, but it is probable that a large proportion thereof have been settled or paid, is privileged where no malice is shown.[35]

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[31] Taylor v. Church, 8 N. Y. 452, in which the rule was established. Ormsby v. Douglass, 37 N. Y. 477. See, also, Montgomery v. Knox, 3 South. Rep. (Fla.) 211; Bacon v. R. R. Co., 66 Mich. 166; Pollasky v. Minchiner, 81 Mich. 280.

[32] Klink v. Colby, 46 N. Y. 427.

[33] 49 New Jersey Law, 417, 9 Atl. Rep. (N. J.) 705.

[34] Taylor v. Church, *supra;* Ormsby v. Douglass, *supra;* Sunderlin v. Bradstreet, *supra;* Bradstreet Co. v. Gill, 72 Tex. 115; Johnson v. Bradstreet Co., *supra;* Erber v. Dunn & Co., 12 Fed. Rep. 526; Mitchell v. Bradstreet Co., 22 S. W. Rep. 358; Pollasky v. Minchiner, 81 Mich. 286.

[35] Searles v. Scarlett (C. A.), 2 Q. B. 56, Gen. Dig. vol. 7, p. 1332.

FORGERY—INSTRUMENTS SUBJECTS OF—CONTRACT AGAINST PUBLIC POLICY.

PEOPLE V. MUNROE.

Supreme Court of California, December 30, 1893.

A contract which, if genuine, would be void as against public policy, may be the subject of forgery.

GAROUTTE, J.: This case was decided in department, but, a rehearing having been ordered, it is now before the court in banc. The appellant was convicted of the crime of forgery, and prosecutes this appeal from the judgment and order denying his motion for a new trial. It is insisted that the facts charged in the information do not constitute the offense of forgery; and that is the only matter relied upon for a reversal of the judgment which demands our attention. We will not enter into a detailed analysis of the various parts of the writing which is the subject of the forgery here charged, but will view it from the standpoint of appellant's claims, and, for the purposes of this investigation, will concede the writing to be an assignment or sale of the unearned salary of a public school teacher for the next ensuing month, together with an order upon the city auditor of Los Angeles for the warrant representing such salary. That being the fact, it is further claimed that Helen Henry, the purported author of the writing, being a public school teacher, is a public officer; and that the sale or assignment of an unearned salary by a public officer is void, being against public policy, and, the writing being void, it cannot be the basis of a charge of forgery. The information charged that this writing was forged and passed by the defendant with intent to defraud one J. W. Jackson; the evidence disclosing that the writing was assigned to Jackson for a valuable consideration, and that subsequently the warrant was delivered to him by the auditor, and the money paid thereon by the treasurer. Section 470 of the Penal Code provides that "every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits any charter [then fol-

lows a list by name of almost every conceivable kind and character of writing], is guilty of forgery." Upon a strict construction, it might in good reason be held that the foregoing definition of forgery curtails the elements necessary to be present in order to constitute the offense, as contradistinguished from forgery recognized by various writers upon criminal law. Under our statute we hold burglary to be an entry into a building with intent to commit larceny; and, upon the same lines, it might be held that forging a writing with intent to defraud another is forgery; and, indeed, it is apparent that the character of the writing is quite insignificant when placed in the balances opposite the other element,—the intent to defraud. But we will take broader ground, and concede the essential ingredients of the crime of forgery to be (1) a false making of some instrument; (2) a fraudulent intent; (3) if genuine, the writing might injure another. The third element stated is expressly recognized by this court to be the true test as to the nature of the writing. People v. Frank, 28 Cal. 514; People v. Tomlinson, 35 Cal. 506; *Ex parte* Finley, 66 Cal. 263, 5 Pac. 222. There is some general language in the Tomlinson Case, taken very probably from People v. Shall, 9 Cow. 784, to the effect that the writing, if genuine, must be sufficient to form the basis of a legal liability, but such is not the true test, in our opinion. The requirements of the statute demand no such construction, and its adoption would result in the escape from justice of many criminals.

Appellant's counsel has cited many cases to the effect that a contract against public policy is illegal and void, and has no standing in courts. He has also cited cases to the effect that a void contract cannot be the subject of forgery. But he has cited no case to the effect that a contract against public policy is not the subject of forgery, and, after diligent examination of authorities, we have failed to find a case to that point, and this court is not willing to be the first judicial body to declare such a doctrine. It would serve no useful purpose to review in detail the cases cited by counsel holding that void contracts are not the subject of forgery. Many of them are cases of *nudum pactum* and others follow the very extreme doctrine laid down in People v. Shall, *supra*, where the learned judge said: "I agree that a man ignorant of the technical requirements of a special agreement might be imposed upon by the paper in question. This remark probably embraces a majority of the community in which we live, and most likely the very parties named in the false instrument. In this view, no doubt, the deed of which the defendant stands convicted involves all the moral guilt of forgery. He believed that he had succeeded in fabricating what purported to be a valid promissory. But legal forgery cannot be made out without imputing a possible, or even actual, ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon legal crime,—upon criminal breaches of professional obligation." It is sufficient to say that this language carries the principle to limits which we cannot follow. The more liberal doctrine, and the doctrine which, in the interests of good government, should be sustained, is declared in People v. Krummer, 4 Parker, 219, where the court says: "We are never called upon to determine whether, in legal construction, the false instrument or writing is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether, upon its face, it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it, if genuine, or have a remedy over." There is no question but that a writing which is a *nudum pactum* is not the subject of forgery; but a contract which a court will not enforce, or even recognize, because it is against the policy of the law, cannot be termed a "*nudum pactum*." A forged contract, even though it covers a subject-matter which makes it void as against public policy, upon its face may present such an appearance that, if genuine, it might injure another, and thus it satisfies the test which we have laid down. The contract may be such that there would not only be a possibility of its injuring another, but a very strong probability of such injury; for there are many contracts against public policy which, upon their face, present a most innocent and most inviting appearance. Even though a contract presented to a court of justice would be declared void as against public policy, yet aside from that fact it may have a pecuniary value to its owner. It could have such a value as that the theft of it would be the subject of larceny; and it would be anomalous to hold an instrument the subject of larceny, and yet its counterfeit not of sufficient value to form the basis of a charge of forgery. If the stealing of the genuine instrument would be larceny, surely the false making of such an instrument would be forgery. To declare the law to be that all contracts which are not enforceable, because against the policy of the law, are not the subject of forgery, would be offering a *carte blanche* to the professional forger, of which he would not be slow to take advantage; and hereafter he would confine himself to the manufacture of spurious paper in the nature of contracts against public policy, for he would thereby be enabled to make a very respectable living,—respectable as to the size of his income, and respectable in that such acts would be no crime.

Contracts against public policy cover a multitude of subjects, and in many cases the determination of their character in this regard calls for the exercise of the nicest discrimination from the most learned judges. From the face of the

contract itself, courts will disagree as to its validity or invalidity. All things which are opposed to moral precepts may be said to be against public policy, and thus we have a great and uncertain field opened up before us. Contracts pertaining to restraint of trade and competition in business have been entered into by parties in the utmost good faith, believing that they were making valid contracts, and upon considerations of the gravest character; and still those contracts subsequently have been declared to be invalid as against public policy. It cannot be contended for a moment that such contracts could not be forged. Suppose a contract contained a covenant upon the part of a competing dealer that he would not again engage in business within the State of California. Thus we have a covenant clearly void under our Code, as being in restraint of trade; yet we think such a contract is the subject of forgery. Certainly, that character of instrument might be well calculated to defraud the tradesman still remaining in business. He might be willing to pay large sums of money for that agreement, well knowing at the time that he could not enforce it in law, but knowing his man, and believing the covenants would be considered binding by the party making them, and that no attempt would ever be made to evade them. Such an agreement is of full value until denied. It answers every purpose of its creation until that time, and purchance it may never be denied. The foregoing illustration in Com. v. Pease, 16 Mass. 91. The defendant was charged with theftbote, defined by Blackstone as where a party robbed not only knows the felon, but also takes his goods again, or "other amends," upon agreement not to prosecute. The offense is here recognized as compounding a felony. The question in that case was, would a promissory note of the defendant satisfy the term "other amends?" Parker, C. J., said: "It is argued that it will not, because such a note will be void in law, and in fact nothing may ever be received; but there seems to be no reason for this nice and critical construction of the words. The note, although voidable, is in fact of value to the holder until it is avoided. It may never be disputed."

Obligations *ultra vires* stand upon the same level with contracts against public policy as to the offense of forgery. If one is not the subject of forgery, neither is the other. In England, corporations are created by special acts of parliament. Within those acts are found the measures of their powers. In this country, the general statutes, in connection with the articles of incorporation, which are public records, form the limitation of their powers. Thus the world deals with corporations with a knowledge of the extent of their powers, and ignorance of the law forms no defense to the plea of *ultra vires*. If this appellant's position be sound, all contracts of corporations which are *ultra vires* are not the subject of forgery. Neither would bonds of municipal corporations which are *ultra vires* form the foundation for a prosecution for forgery. The determination of the powers of corporations, both private and municipal, is a question often involving the most complex principles of legal jurisprudence, and, if *ultra vires* contracts may not be forged, a rich field for the successful practice of fraud is presented to the forger. In State v. Eades, 68 Mo. 150, it is said that the fraudulent making of a false municipal certificate of indebtedness is forgery, though the municipality had no power to issue such certificate; and this principal is in line with sound reason, and fully commends itself to our views. It is held that contracts made under an unconstitutional law are void. Every man is presumed to know the law, and appellant's contention would free the criminal forging such a contract. Vilhac v. Railroad Co., 53 Cal. 208. In other words, it would be a good defense to a prosecution for forgery that the law under which a genuine contract similar to the forged one might be made is unconstitutional. Such a plea is too remote from the crime of which the accused stands charged, and his liberty must be regained upon more substantial grounds. As to what contracts are against public policy, or *ultra vires*, or void as creations under unconstitutional statutes, we think matters entirely foreign to a prosecution for forgery. In the examination of such grave and abstruse questions, the criminal element of the case would soon be lost to view. For the purposes of the case, we conceded at the outset that this instrument would be declared void by a court as against public policy; but, if that question were a live issue in the case, this contract might be declared valid upon the ground that a teacher in the public schools is not a public officer. Certainly, the law as to that point is not so plain but that an ordinary layman, in the exercise of the greatest care, might not be defrauded in taking an assignment of a public school teacher's unearned salary.

There is a further view to be taken of this question, which is also fatal to appellant's claims, and which was incidentally touched upon in noticing the Pease Case. Aside from the non-enforceable character of this contract in a court of justice, it has an inherent substantial value. It is said in Marton's Case, 2 East, P. C. 855. "That, though a compulsory payment by course of law could not have been enforced for want of the proper stump, yet a man might equally be defrauded by a voluntary payment being lost to him." It cannot be said that a contract has no value because you have no standing in court to enforce it. Who can say in advance that the money will not be voluntarily paid, as agreed upon by its terms? Who can say that Helen Henry would not have lived up to the very letter of this instrument, if it had been her genuine contract? If her word is as good as it should be; if her conduct of the affairs of life is actuated by those principles of truth and justice which surely should be found in the breast of

every teacher in our public schools,—then her act and deed, as evidence by a writing such as is present in this case, would be a valuable instrument to the holder thereof; just as valuable as though it were enforceable in the courts of the land. If a genuine instrument signed by Helen Henry similar to the forged one found in this case possessed such value the conclusion is irresistible that the forged paper was such as might defraud another. Again, if the paper had been the genuine act of Helen Henry, and upon the strength of her signature the proper officer had paid the amount it called for to Jackson, the legal holder thereof, however invalid the writing may have been as against public policy, the money would have been beyond the reach of Helen Henry forever. She could not have recovered it from the officer paying it out, or from Jackson who received it. Her mouth would be closed to assert ownership in herself. The writing would serve as a perpetual barrier to the recognition by courts of any claim upon her part; and, for this reason also, the instrument was of such value as to make it the foundation of a charge of forgery. It is ordered that the judgment and order be affirmed.

We concur: McFarland, J.; Paterson, J.; Harrison, J.

De Haven, J. I concur in the judgment. The writing alleged to have been forged is one which, if genuine, would be void, because against public policy; but nevertheless such a writing is, in my opinion, the subject of forgery.

NOTE.—At common law to constitute forgery the instrument need not be such as if genuine would be legally valid. If it is calculated to deceive and was intended to be used for a fraudulent purpose this is enough. 8 Am. & Eng. Ency. of Law, 478. It is a general rule that any writing in such form as to be the means of defrauding another may be the subject of forgery or alterations in the nature of forgery. Berrisford v. State, 66 Ga. 53; Arnold v. Cost, 3 Gil. & J. (Md.) 219; Barnum v. State, 15 Ohio, 717; State v. Briggs, 34 Vt. 501; Rollins v. State, 22 Tex. App. 548. The false writing of any instrument calculated to deceive and which if genuine might subject the person signing it to damages, is forgery (Dickson v. State, 81 Ala. 61; Reed v. State, 28 Ind. 96; Clarke v. State, 8 Ohio St. 630), such as acquittance for a specific sum of money (United States v. Green, 2 Cr. C. C. 52), book entries (People v. Phelps, 49 How. Pr. 442; Byles v. Commonwealth, 32 Pa. St. 529), false entries made by the treasurer of a society in his bankers pass-book of deposit purporting to have been made for such society (Reg. v. Moody, 9 Cox, C. C. 166), false entries in books by original entries where they are legal evidence against the vendee. State v. Young, 46 N. H. 266, 88 Am. Dec. 212; Byles v. Commonwealth, 32 Pa. St. 529.

Thus it is forgery to falsely alter accounts for joint settlement (Barnum v. State, 15 Ohio, 717), a certificate of acknowledgment (State v. Dufour, 63 Ind. 567), a false certificate such as a certificate of negotiable paper where it takes the form of an indorsement (Poage v. State, 3 Ohio St. 229), a certificate of character with intent to defraud and with a capacity for defrauding (Reg. v. Moah, 7 Cox, C. C. 503), a certificate of character of a seaman to secure him an appointment to act as a mate (Reg. v. Toshack, 4 Cox, C. C. 338), as a parish school-master (Reg. v. Sharman, Dears, C. C. 285), a police constable. Reg. v. Moah, *supra*.

So also a certificate of deed of lands (State v. Shurtleff, 18 Mo. 368; State v. Fisher, 65 Mo. 437; People v. Flanders, 18 Johns. (N. Y.) 163; Henderson v. State, 14 Texas, 503), although the pretended grantor is dead or has no title or the land is situated in another State. Henderson v. State, *supra;* People v. Flanders, *supra*. So also, a diploma where it is to be used as a certificate of character (McClure v. Commonwealth, 86 Pa. St. 353), a certificate of an artist's name to a picture. Reg. v. Closs, 7 Cox, C. C. 494. So, also, an evidence of debt (Van Horn v. State, 5 Ark. 349; Commonwealth v. Henry, 118 Mass. 460; Butler v. Commonwealth, 12 Serg. & R. 237), such as bank notes (State v. Van Hart, 17 N. J. L. 327; Thompson v. State, 9 Ohio St. 354; Buckland v. Commonwealth, 8 Leigh (W. Va.), 732), bank check (Hawthorn v. State, 56 Md. 530; State v. Coyle, 41 Wis. 267), bills of exchange (Reg. v. Harper, L. R. 7 Q. B. Div. 778), bonds (Bowles v. State, 37 Ohio St. 35; Bishop v. State, 55 Md. 138), county warrants (State v. Fenley, 18 Mo. 445), federal securities (People v. Heed, 1 Idaho, 531; Bletz v. Columbia National Bank, 87 Pa. St. 87), promissory notes (People v. Frank, 28 Cal. 507. Cross v. People, 47 Ill. 152; State v. McMackin, 70 Iowa, 281; Abbott v. Rose, 62 Me. 194; State v. Young, 47 N. H. 402; State v. Hill, 30 Wis. 416, overruling John v. State, 23 Wis. 504), receipts (State v. Riebe, 27 Minn. 315; State v. Shelters, 51 Vt. 102; Commonwealth v. Lawless, 101 Mass. 32; Commonwealth v. Talbot, 84 Mass. 161), any writing purporting to contain promises to pay, such as a due bill (Nelson v. State, 82 Ala. 44), also instruments defective because of a lack of legal formalities, *e. g.*, because of want of seals, stamps or due attestation (People v. Frank, 28 Cal. 507; Cross v. People, 47 Ill. 152; Laird v. State, 61 Md. 309; State v. Young, 47 N. H. 402), any judicial writ or record (Jacobs v. State, 61 Ala. 448; *Ex parte* Finley, 66 Cal. 263; State v. Johnson, 26 Iowa, 407; State v. Hilton, 35 Kan. 338; State v. Kimball, 50 Me. 408; State v. Tompkins, 71 Mo. 613; Commonwealth v. Bemish, 81 Pa. St. 389), letters of credit (United States v. Green, 2 Cr. C. C. 521), letters of recommendation (Mitchell v. State, 56 Ga. 171), official stamp on a corporate instrument (People v. Graham, 1 Parke Cr. Cas. (N. Y.), 141), an order for the delivery of goods (Hobbs v. State, 75 Ala. 1; People v. Way, 10 Cal. 336; Butler v. State, 66 Ga. 157; Stewart v. State, 111 Ind. 544), orders for the payment of money (Wright v. State, 79 Ala. 262; Powers v. State, 87 Ind. 97; State v. Baumon, 52 Iowa, 68; Commonwealth v. Ayer, 74 Mass. 280; State v. Lane, 80 N. Car. 407), a petition to the legislature (Alexander v. Alexander, 9 Wend. 141), a power of attorney (3 Wheel. Cr. Cases. 163), a physician's certificate of sickness forged in order to secure weekly allowance of money provided by secret society (Commonwealth v. Ayer, 57 Mass. 163), written request for the loan of money (State v. Williams, 81 Ala. 33), railway or other ticket (Commonwealth v. Ray, 69 Mass. 441), railway pass (Commonwealth v. Ray, *supra*), a statement where the writing if true would expose the party purporting to execute the instrument to an action of assumpsit (Ames' Case, 2 Me. 365), telegraphic message (Reg. v. Stewart, 25 Up. Can. C. P. 440) a transfer of land. Phillips v. State, 6 Tex. App. 364.

It has been held that the following instruments are not subjects of forgery the acknowledgment of money received, where not an actionable receipt

(United States v. Lawrence, 13 Blackf. C. C. 210), certificates imposing no duty and conferring no right (Commonwealth v. Lawless, 101 Mass. 32; Commonwealth v. Talbot, 84 Mass. 161), such as certificates of good character (Commonwealth v. Hines, 101 Mass. 209); a deed void on its face (Perdue v. Aldridge, 19 Ind. 290; Smith v. Hunt, 13 Ohio, 260; Henderson v. State, 14 Texas, 503); letters of introduction (Mitchell v. State, 56 Ga. 171; Watermanv. People, 67 Ill. 91); a writing stating that a certain note is perfectly good (State v. Givens, 5 Ala. 747) a writing containing no obligation (Waterman v. People, 67 Ill. 91); or writings which are void in form (Abbott v. Rose, 62 Me. 194; Commonwealth v. Hines, 101 Mass. 209; People v. Shall, 9 Cowan (N. Y.), 778).

BOOK REVIEWS.

RAPALJE ON REAL ESTATE BROKERS.

We are assured by the learned author that this book is not put forth as a "treatise" so called, but rather as an exhaustive and careful compilation of the case law upon the rights and liabilities arising out of the relation of broker and customer. The cases upon the subject are of compargtively recent development and therein will be found the main value of the work. It treats in successive chapters of the appointment of broker, his authority and duty, acting for both parties and for himself, the execution of contract by the broker, power to bind the principal, liability to principal and to the purchaser, ratification and revocation. Upon the subject of compensation are right to commissions generally, the contract to pay commissions, commissions when earned, who liable for commissions, commissions from both parties, acts of principal intended to deprive broker of commission, sale through another broker, transactions closed directly with principal failure of purchaser to perform, objections to the title and procedure in suits for commissions. The text is well prepared and the notes are exhaustive. It is a 12mo. volume of nearly three hundred pages. Published by L. K. Strouse & Co., New York.

PARSONS ON CONTRACTS.

This is the eighth edition of a work which has now become one of the classics of the profession. The first edition appeared in 1853. The learning and reputation of the writer as an expounder of the law is not by any means confined to this country and though he is the author of many valuable treatises, it may be said that he is best known by this. In view of all these things and the well known merit of the work, all that seems to be in order is to call attention to this edition and to say that the work of the present editor, Samuel Williston seems to have been conscientiously performed. We have no hesitatation in commending these volumes as being the most valuable dissertation on the law of contracts published in this country, if not elsewhere. It is in three volumes, handsomely printed and bound. Published by Little, Brown & Co., Boston.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE — Application.—Where a solicitor of accident insurance, knowing that a person already has insurance in another company, informs the secretary of his company thereof, and is instructed by the secretary to solicit insurance of him notwithstanding this, the fact that the solicitor states in the application that the applicant has no other insurance will not avoid the policy, the right to have it forfeited by reason thereof being waived.—DAILEY V. PREFERRED MASONIC MUT. ACC. ASS'N OF AMERICA, Mich., 57 N. W. Rep. 184.

2. ACCOUNTING—Remedy at Law.—Where the specific facts stated in a bill in equity, notwithstanding vague and general allegations as to equitable jurisdiction, show that there is a plain, adequate, legal remedy as to the matters in dispute, the demurrer to such bill should be sustained, and the plaintiff remitted to his legal remedy.—VAN DORN V. LEWIS COUNTY COURT, W. Va., 18 S. E. Rep. 579.

3. ADMIRALTY — Maritime Liens — Priority.—A lien for supplies, and a lien arising out of the neglect of some duty assumed by a voluntary agreement between the parties, are equal in point of merit, and priority will be given to that one which first accrued.—THE JOHN G. STEVENS, U. S. D. C. (N. Y.), 58 Fed. Rep. 792.

4. ADMIRALTY — Shipping — Carriers.—A shipowner cannot by stipulation exempt himself from the consequences of his own negligence. Such stipulations are held void in this country, as contrary to public policy, and as not being evidence of any contract, so far as the shipper or consignee is concerned.—THE GUILDHALL, U. S. D. C. (N. Y.), 58 Fed. Rep. 796.

5. ADVERSE POSSESSION — Coverture.—A married woman will not lose title to land through a possession first asserted to be adverse, during her coverture, by the widow of the original occupant, who, during his life-time, and at the time of the owner's marriage, held in subordination to her title.—OURY V. SAUNDERS, Tex., 24 S. W. Rep. 341.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS.—The fact that a note preferred by the terms of an assignment for the benefit of creditors was paid before delivery of the assignment does not invalidate the assignment, when the assignee was informed of the payment, and the creditors were not prejudiced by the failure to withdraw the item.—JONES V. MCQUEEN, Miss., 14 South. Rep. 146.

7. ASSUMPSIT — Pleadings.—Where a plaintiff has done everything which has to be executed on his part, and nothing remains to be done but the performance of a duty on defendant's part to pay money due the plaintiff under contract, the plaintiff may recover on the common counts in *assumpsit*, and need not declare specially.—JACKSON V. HOUGH, W. Va., 18 S. E. Rep. 575.

8. ATTACHMENT — Affidavit.—An affidavit for attachment is not void, although purporting, in its opening clause, to be that of a corporation plaintiff, where it sufficiently appears from the whole affidavit that it is

that of the agent of the corporation, and that such agent in fact made oath thereto, and signed it.—MOLINE, MILBURN & STODDARD CO. v. CURTIS, Neb., 57 N. W. Rep. 161.

9. ATTACHMENT—Forthcoming Bond.—The giving of a proper undertaking under sections 5009, 5010, Comp. Laws, discharges the attachment.—WYMAN v. HALLOCK, S. Dak., 57 N. W. Rep. 197.

10. ATTACHMENT—Shares of Stock—Equitable Title.—Shares of stock in which defendant has only the beneficial interest, and which stand in the name of a third person as trustee, cannot be subjected to attachment as defendant's property, since, in the absence of estoppel, the right to attach shares of stock exists only where the legal title is vested in defendant.—GYPSUM PLASTER & STUCCO CO. v. KENT CIRCUIT JUDGE, Mich., 57 N. W. Rep. 191.

11. ATTACHMENT LIEN—Delivery Bond.—The lien of an attachment is not destroyed by the delivery of the property to the owner on his furnishing a delivery bond, and if the officer, after surrendering it, seizes it under other attachments, it is subject to disposition under the lien of the first attachment, and the sureties on the delivery bond are relieved from liability thereon by such resumption of possession by the officer.—SCHNEIDER v. WALLINGFORD, Colo., 34 Pac. Rep. 1109.

12. BANKS—Overdraft of Firm.—A bank cannot charge an overdraft of a firm against the individual account of a member of the firm, though the member, as such, may be liable for the overdraft.—ADAMS v. FIRST NAT. BANK OF WINSTON, N. Car., 18 S. E. Rep. 513.

13. BUILDING AND LOAN ASSOCIATIONS—Incorporation.—As, under the general law, any corporation not prohibited may be formed with any customary and appropriate powers not inconsistent with law, building and loan associations may be incorporated, with power to impose fines for non-payment of dues, though there is no statute expressly authorizing the creation of such corporations.—GOODMAN v. DURANT BLDG. & LOAN ASS'N, Miss., 14 South. Rep. 146.

14. CARRIERS—Connecting Lines—Agent.—The station agent of a connecting carrier, solely by virtue of that position, has not authority to waive a provision of the contract between the initial carrier and the shipper in regard to the time of bringing suit.—GULF, C. & S. F. RY. CO. v. CLARKE, Tex., 24 S. W. Rep. 355.

15. CARRIERS — Contract of Shipment. — The reasonableness of a contract of shipment of stock which requires the shipper, as a condition precedent to a recovery of damages for any injury to his stock, to give notice of his claim therefor to some general officer of the carrier, or its nearest station agent, before the stock is removed from the place of destination or mingled with other stock, and within one day after its arrival, is for the jury when the contract is for an interstate shipment, as well as when it is for a domestic one.—INTERNATIONAL & G. N. R. CO. v. GARRETT, Tex., 24 S. W. Rep. 354.

16. CARRIER—Negligence of Connecting Lines.—If the contract of shipment is attached to the petition, defendant need not plead a stipulation therein exempting it from responsibility for the articles shipped beyond its own line.—GULF, W. T. & P. RY. CO. v. GRIFFITH, Tex., 24 S. W. Rep. 362.

17. CARRIERS—Passengers — Joint Liability. — An action against two railroad companies for personal injuries to a passenger from their negligence causing derailment of a train is an action *ex delicto*, notwithstanding an allegation in the complaint that plaintiff held a ticket for transportation on the railroad, and the right to recover against one is not affected by the fact that plaintiff fails to sustain the action against the other.—ATLANTIC & PAC. R. CO. v. LAIRD, U. S. C. C. of App., 58 Fed. Rep. 760.

18. CARRIER—Special Damages.—Failure of an express company to deliver, within a reasonable time, the order book of a nurseryman, containing the names of his customers, does not render the company liable for losses resulting through his inability to fill their orders, unless the company had notice that it was necessary for him to have the book to enable him to deliver the trees.—WELLS, FARGO & CO. v. BATTLE, Tex., 24 S. W. Rep. 353.

19. CARRIERS OF PASSENGERS—Decree of Care.—In an action by a passenger against a carrier for personal injuries, an instruction that the carrier must use "all possible care" for a safe conveyance is erroneous, since carriers are required to exercise, not the highest degree of prudence, but only the utmost that can be exercised under the circumstances, short of a warranty of the safety of the passengers. — INTERNATIONAL & G. N. R. CO. v. WELCH, Tex., 24 S. W. Rep. 390.

20. CARRIERS OF PASSENGERS—Transportation of Explosives.—The prohibition in Rev. St. § 5353, against transporting nitroglycerin upon vehicles engaged in interstate passenger traffic, extends also to dynamite which is made by mixing nitroglycerin with some solid and inert absorbent substance, and contains no other explosive ingredient.—UNITED STATES v. SAUL, U. S. D. C. (N. C.), 58 Fed. Rep. 763.

21. CERTIORARI TO JUSTICE'S COURT.—Where a justice in a suit involving a matter merely pecuniary has jurisdiction of the subject-matter and of the person, and renders a *bona fide* judgment on the merits clearly wrong, but within the scope of his legitimate powers, the Circuit Court will not, upon a writ of *certiorari* issued in the exercise of its original supervisory jurisdiction conferred by the constitution, review and reverse such judgment, but will dismiss the writ as improvidently awarded.—WILSON v. WEST VIRGINIA C. & P. RY. CO., W. Va., 18 S. E. Rep. 577.

22. CLAIM AND DELIVERY—Installment Mortgage.—The action of a claim and delivery for the possession of property under a chattel mortgage providing for payment of weekly installments may be maintained for the installments past due and unpaid at the date of the writ.—KIGER v. HARMOND, N. Car., 18 S. E. Rep. 515.

23. CONTRACT — Illegality. — An action on contract will be dismissed where defendant shows illegality of the contract by cross-examination of plaintiff's witnesses, though defendant did not specially plead such illegality.—AH DOON v. SMITH, Oreg., 34 Pac. Rep. 1093.

24. CONTRACTS—Parol Evidence.—In an action relative to matters connected with a contract between plaintiff and defendants, whereby plaintiff was to cut and manufacture timber on defendant's land, the admission of evidence that defendant P stated to plaintiff, after the contract was made, that he would look after the business for himself and defendant B, does not tend to vary a written contract by parol, but merely to show that B consented to the management of the business for her by P.—SAXTON v. PELLS, Mich., 57 N. W. Rep. 169.

25. CONTRACT—Services.—Where a minor lives with his uncle as a member of his family, the uncle furnishing him with food, raiment, and shelter, and the minor rendering to his uncle his services, without any contract or mutual understanding as to compensation for support of wages to be paid, such minor cannot recover from the uncle, nor from his personal representative, the value of the services thus rendered, though the value of such services may have been greater than the value of such support.—RILEY v. RILEY, W. Va., 18 S. E. Rep. 569.

26. COUNTIES—Negligence.—The failure of the county commissioners' court to put the county convicts to work on the public roads, as required by Rev. St. art. 3591, and permitting them to remain in jail until fines and costs are satisfied by imprisonment, does not render the county liable to the prosecuting attorney for his fees accruing to him for the prosecution of such convicts, which the county is required, by article 3600, to pay out of the labor of such convicts, since the county is not liable for the negligence of its officers,

unless made so by statute.—WALTON v. TRAVIS COUNTY, Tex., 24 S. W. Rep. 352.

27. COURTS— Disqualification of Judge.— A district judge is not disqualified from presiding on a trial for a criminal offense by the fact that he was district attorney when it was committed, where it appears that he had nothing to do with the prosecution of the case, either in examining the witnesses, or preparing the complaint or indictment, and that he resigned his position before the indictment was presented.—UTZMAN v. STATE, Tex., 24 S. W. Rep. 412.

28. CRIMINAL EVIDENCE—Homicide.—On a prosecution for an assault with intent to murder one S, who had struck defendant during a social entertainment, for insulting language concerning his (S's) sister, it was proper to prove that a short time previously defendant had used insulting language concerning another lady, as the remarks were part of the *res gestae*, and tended to show that defendant was fatally bent on mischief, and determined to provoke trouble.—WISEMAN v. STATE, Tex., 24 S. W. Rep. 413.

29. CRIMINAL EVIDENCE—Murder—Co-Conspirators.—On the trial of two brothers, jointly indicted with their father for murder, where it is shown that all three acted together in committing the crime, evidence that, soon after the deed, one of the brothers was seen wearing the sash of deceased, and that said brother, with the father, sold the gun of deceased, is admissible against the other brother, though he was not present at either of these occasions.—CONDE v. STATE, Tex., 24 S. W. Rep. 415.

30. CRIMINAL EVIDENCE—Reputation.—Witnesses who have testified that another's reputation for truth is bad may be asked whether from that general reputation he is worthy of belief on oath.—MAYES v. STATE, Tex., 24 S. W. Rep. 421.

31. CRIMINAL LAW—Accomplice.—On a criminal trial the court charged "that they (the jury) might convict on the unsupported testimony of an accomplice, but that it was dangerous and unsafe to do so; but if the story of the accomplice, taken with the other facts and circumstances in the case, carry conviction to the minds of the jury, then it is their duty to convict. The jury must be satisfied, beyond a reasonable doubt, of the guilt of the defendant, before they can convict:" Held, not objectionable as tending to mislead the jury as to the weight to be given to an accomplice's testimony.—STATE v. BARBER, N. Car., 18 S. E. Rep. 515.

32. CRIMINAL LAW—Aider and Abettor.—On a murder trial it appeared that during an altercation at a dance defendant's brother stabbed deceased, while defendant struck him on the head with a rock: Held, that defendant is not responsible for the brother's act, nor is he guilty of aiding and abetting the brother, if he acted without knowledge of the brother's intention, and not in concert with him; but defendant is nevertheless responsible for the homicide if the blow with the rock contributed materially to the death of deceased.—WILSON v. STATE, Tex., 24 S. W. Rep. 409.

33. CRIMINAL LAW—Cross-Examination of Accused.—When, on cross-examination of an accused upon matters not legitimately to be asked in rebuttal, but which it is claimed might properly be asked by way of impeachment or attack upon the credibility of the witness, prosecuting attorneys should announce the object and purpose of their questions, and offer to restrict the effect of the testimony.—STATE v. KENNON, La., 14 South. Rep. 187.

34. CRIMINAL LAW — Larceny—Verdict.—As Code, § 1191, permits the joining in an indictment of a count for larceny with one for receiving stolen goods, knowing them to have been stolen, a general verdict of guilty, under an indictment charging both offenses, is good.—STATE v. CARTER, N. Car., 18 S. E. Rep. 517.

35. CRIMINAL LAW — Misconduct of Prosecuting Attorney.—Where, on a prosecution for fogery, the chief evidence against defendant was the testimony of H, the principal in the crime, and in his own behalf his own testimony, a conviction will be reversed where the prosecuting attorney asked defendant if he had not at another time forged his father-in-law's name, and also asked the captain of police if one S had not come to him and reported about defendant wanting him to tell H to skip, though the questions are stricken out, since the asking of them was prejudicial and inexcusable, and made evidently for the purpose of taking an unfair advantage of defendant.—PEOPLE v. WELLS, Cal., 34 Pac. Rep. 1078.

36. CRIMINAL LAW — New Trial — Newly-Discovered Evidence.—Where there is no affidavit by the accused or his counsel that the alleged newly-discovered evidence was unknown at the time of the trial, a new trial will not be granted on the ground of newly discovered evidence.—DEAN v. STATE, Ga., 18 S. E. Rep. 557.

37. CRIMINAL LAW—Pleading Guilty.—The fact that a bailiff of the city court privately advised the accused to enter a plea of guilty, and that he acted upon this advice, is no ground for a new trial, it appearing that the court fully explained to the accused his legal rights, and that he deliberately entered the plea of guilty under circumstances that would charge him with knowledge of its consequences.—KEITH v. STATE, Ga., 18 S. E. Rep. 551.

38. CRIMINAL LAW—Separation of Jury.—In capital cases, where the jurors have separated, and the sheriff or his deputy has failed to properly keep them in charge, abuse and misconduct will be presumed, and the verdict will be set aside.—STATE v. FOSTER, La., 14 South. Rep. 180.

39. CRIMINAL PRACTICE—Rescue.—In an indictment for breaking into a jail for the purpose of liberating prisoners, it is not necessary to charge that the breaking was done "willfully" and by "force," such words not occurring in Pen. Code, art. 212, defining the offense.—LOGGINS v. STATE, Tex., 24 S. W. Rep. 408.

40. CRIMINAL PRACTICE—Robbery.—An indictment for robbery, describing the property stolen as "money, jewelry, and hair ornaments," no demurrer or objection to evidence being taken, is good on motion to arrest judgment, under Pen. Code, § 967, providing that, in an indictment for larceny of money, it is enough to allege the larceny to be of money, without specifying the coin, number, denomination, or kind thereof.—PEOPLE v. CHUEY YING GIT, Cal., 34 Pac. Rep. 1080.

41. CRIMINAL PRACTICE — Witnesses. — Under Code Proc. § 1230, providing that the prosecuting attorney shall indorse on the information names of the witnesses known to him at the filing thereof, and, at such time before the trial as the court may prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him, the name of a witness not known to the prosecuting attorney at the time of filing the information may be indorsed thereon during the impaneling of the jury, before it is sworn and accepted.—STATE v. LEE DOON, Wash., 34 Pac. Rep. 1103.

42. CRIMINAL TRIAL—Presence of Defendant.—Where the examination of a witness for the prosecution is permitted, during the absence of defendant, in violation of the provision of the bill of rights that the accused "shall be confronted with the witnesses," and that of the Code Crim. Proc. art. 596, that in a prosecution for felony "defendant must be personally present at the trial," the error is not cured by the subsequent withdrawal from the jury of the testimony of such witness.—BELL v. STATE, Tex., 24 S. W. Rep. 418.

43. DEED — Construction. — Where it is doubtful whether an instrument in the form of a deed, attested and delivered as such, and showing upon its face that it was made partly for value, and partly for love and affection, be testamentary or not, some of its language importing a present conveyance, with reservation of a life estate, and some indicating a purpose to postpone the vesting of title until the death of the maker, the safer and better construction of the instrument is that it was intended to pass an interest at the time of

delivery, and to postpone only the possession and use. —OWEN V. SMITH, Ga., 18 S. E. Rep. 527.

44. DEED — Description of Grantees. — Where the vendees in a deed of conveyance, founded upon a valuable consideration paid by them, were described as trustees, no trust being declared and no beneficiary named, the word "trustees" is mere surplusage, and the vendees took the title for their own use, free from any trust whatsoever. — ANDREWS V. ATLANTIC REAL-ESTATE CO., Ga., 18 S. E. Rep. 548.

45. DEED BY MARRIED WOMAN. — Act April 30, 1846, defining the mode in which a wife may convey her separate estate, and providing that the deed shall pass the interest which she "may have" in the property refers only to interests owned by the wife at the time of the conveyance; and a deed by a wife, purporting to convey an entire tract of land, of which she owns only an undivided half, does not convey an interest which she subsequently acquires in the other half by inheritance.—WADKINS V. WATSON, Tex., 24 S. W. Rep. 385.

46. DIVORCE — Alimony.—In a divorce case, wherein plaintiff alleged that she was defendant's lawful wife by a marriage in Russia, defendant denied the validity of the marriage, but admitted long-continued cohabitation, and the birth of four children. Defendant also charged plaintiff with adultery, and alleged that he had obtained a Mosaic divorce from her: Held, that there was sufficient *prima facie* proof of marriage to entitle plaintiff to alimony *pendente lite*.—FINKELSTEIN V. FINKELSTEIN, Mont., 34 Pac. Rep. 1090.

47. DIVORCE—Division of Property.—Where the parties appear to be in equal wrong, and the court refuses to grant a divorce, it has the power to direct an equal division of the property when the wife has title to more than her share.—VAN BRUNT V. VAN BRUNT, Kan., 34 Pac. Rep. 1117.

48. EMINENT DOMAIN—Condemnation.—The provision of Rev. St. Ind. § 3167, that city councils, before referring any matter of condemnation to the city commissioners, shall first refer it to an appropriate committee, to examine and report thereon, is mandatory, and failure to comply therewith is fatal.—CITY OF MADISON V. DALEY, U. S. C. C. (Ind.), 58 Fed. Rep. 751.

49. EMINENT DOMAIN — Evidence of Damages. — To show the market value of land condemned, the report of commissioners appointed to assess neighboring land, reciting the price to be paid for neighboring land, and the consideration which determined such report, is irrelevant.—CITY OF SAN LUIS OBISPO V. BRIZZOLARA, Cal., 34 Pac. Rep. 1083.

50. EQUITY PLEADING—Jurisdictional Pleas.—Where a bill is brought to set aside an alleged fraudulent appointment under a will and to enforce the rights of a distributee in the estate a plea, which merely alleges the pendency of prior proceedings in the orphans' court of another State, without distinctly showing that such court has possession of the *res*, should not be sustained. — BRIGGS V. STROUD, U. S. C. C. (Wis.), 58 Fed. Rep. 717.

51. EVIDENCE—Documents—Parol Evidence.—Without some evidence of the genuineness of an unsealed document offered in evidence as a plat and grant from the State, the exclusion of the evidence of a witness that "the wax and seal had been attached to said plat and grant, and was lost," was not erroneous. — ADAMS V. WILDER, Ga., 18 S. E. Rep. 530.

52. EXECUTION — Against Land of Decedent.—A sale of a decedent's land under a writ of *venditioni exponas* issued after his death, without the issue and service of a *scire facias* against his heirs, is null and void.—BARFIELD V. BARFIELD, N. Car., 18 S. E. Rep. 505.

53. FEDERAL COURTS—Decision State Courts.—A decision by a State Court in an action at law for a collision on a navigable river, denying a right claimed to navigate such river in accordance with the statutory rules of navigation, may be reviewed by the Supreme Court.—BELDEN V. CHASE, U. S. S. C.,,14 S. C. Rep. 264.

54. FEDERAL COURTS — Enforcing State Statutory Liens.—In cases of proper citizenship, the Federal Courts have equitable jurisdiction to enforce against railroad companies judgments rendered in the State Courts on material or labor claims, when the State statute makes such judgments superior liens on the property of the company in the county of their rendition, without providing any method of enforcing the same or binding other persons who claim interfering liens.—GILCHRIST V. HELENA HOT SPRINGS & SMELTER R. CO., U. S. C. C. (Mont.), 58 Fed. Rep. 708.

55. FEDERAL COURTS — Instructions — Evidence.—A federal judge is authorized, in criminal as well as civil cases, to express his opinion on the questions of fact which he submits to the jury, when he further tells them that they are the sole judges of the weight of the evidence and the credibility of the witnesses.—WOODRUFF V. UNITED STATES, U. S. C. C. (Kan.), 58 Fed. Rep. 766.

56. FEDERAL COURTS—Supreme Court—Receivers.—Where a suit brought against a federal railroad receiver and the railroad company results in a judgment against the company and in favor of the receiver, a writ of error by the company to the United States Supreme Court cannot be maintained on the ground that an immunity claimed under the authority of the receiver was denied; for the immunity must be one of the plaintiff in error, and not of a third person.—TEXAS & P. RY. CO. V. JOHNSON, U. S. C. C., 14 S. C. Rep. 250.

57. FEDERAL OFFENSE—Obscene Sealed Letters.—The mailing of an obscene, private, sealed letter is not within the prohibition of Rev. St. § 3893, as amended September 26, 1888, by the insertion of the work "letter," for all the words of enumeration are limited in character by the concluding words, "or other publication."—UNITED STATES V. WILSON, U. S. D. C. (Cal.), 58 Fed. Rep. 768.

58. FORCIBLE DETAINER — Threats of Arrest.—Procuring the possession of premises by threats of arrest of the tenant occupying the same, if he does not surrender them within two hours, is a forcible detainer of the premises, within the meaning of Code Civil Proc. § 716, which defines "forcible entry and detainer" as a peaceable entry on the land, "and the turning out by force or frightening by threats, or other circumstances of terror, the party or parties out of possession, and detaining and holding the same."—WELLS V. DARBY, Mont., 34 Pac. Rep. 1092.

59. FRAUDULENT CONVEYANCES—Chattel Mortgage.—A wife who has purchased property on execution against her husband may attack a prior mortgage thereon by the husband on the ground of fraud.—WATSON V. MEAD, Mich., 57 N. W. Rep. 181.

60. FRAUDULENT CONVEYANCES — Preferring Creditors.—When a creditor of an insolvent debtor secures an unlawful preference by the transfer of property, the transfer will, at the suit of the assignee in insolvency, be wholly void. It will not be partly valid because the creditor, to secure the preference, paid in money part of the agreed price of the property.—THOMPSON V. JOHNSON, Minn., 57 N. W. Rep. 223.

61. GARNISHMENT — Judgment.—The fact that one summoned as garnishee admitted an indebtedness to the principal defendant, and judgment was rendered against him, but not paid, does not prevent plaintiff from suing another person on the debt so admitted by the garnishee, and afterwards assigned by the defendant to plaintiff, and from showing that such other person, and not the garnishee, is the real debtor.—LEWIS V. ROBERTSON, Ala., 14 South. Rep. 166.

62. HABEAS CORPUS—Pleadings.—Upon the return to a writ of *habeas corpus* by the officer in whose custody the person required to be produced is held, the petitioner may plead to the same, and if he fails to do so the case must be determined upon the return; and, if it appears thereby that the party is detained by virtue of a warrant, the question of the lawfulness of such detention must depend upon the validity of such warrant. But in such case the officer can only inquire

whether the process is void because of jurisdictional defects.—STATE v. BILLINGS, Minn., 57 N. W. Rep. 206.

63. HABEAS CORPUS — Validity of Commitment.—Where prisoners are committed for removing mortgaged property, by a justice of the peace, who has jurisdiction of the crime charged, and the commitment is in good form, neither the Supreme Court nor the judge of the Circuit Court, on application for a writ of *habeas corpus* to secure their absolute discharge, can pass on the sufficiency of the alleged mortgage, or its admissibility as evidence in a trial of the case.—EX PARTE PERDUE, Ark., 24 S. W. Rep. 423.

64. HOMESTEAD—An instrument executed by testator's widow recited that in consideration of $50,000, the amount of her legacy, paid her by one of the heirs, she conveyed to him all her interest in testator's estate; that such instrument was a conveyance of her interest both as legatee and as widow or heir if the will were revoked: Held not to bar her right to a probate homestead, as a widow's right to probate homestead is not an interest in land, and consequently was not embraced in the conveyance.—IN RE VANCE'S ESTATE, Cal., 34 Pac. Rep. 1087.

65. HOMESTEAD— Lien—Unacknowledged Contract.—Sayles' Civil St. art. 3174, provides that, in order to create a lien on a homestead for improvements erected thereon, there must be a contract in writing, signed by the husband and wife, and acknowledged by her, as is required in making a sale of the homestead, and that such contracts "shall be recorded in the county clerk's office:" Held, that it was not the intent of the legislature to allow such contracts to be recorded without the acknowledgment of the husband, which is required by the general statute relative to registration.—KALAMAZOO NAT. BANK v. JOHNSON, Tex., 24 S. W. Rep. 350.

66. HOMESTEAD — Mortgage — Foreclosure. — Under Civil Code, § 1265, providing that, upon the death of one of the spouses, the homestead rests in the survivor if it had been selected from community property, the children of homesteaders, upon the death of their father, acquire no interest by succession as his heirs at law in a homestead so selected, and hence no equity vests in them to redeem from the foreclosure of a mortgage on such homestead.—COLLINS v. SCOTT, Cal., 34 Pac. Rep. 1085.

67. HUSBAND AND WIFE—Agent of Wife.—A husband, when acting as agent for his wife, has no authority, merely by virtue of his appointment as agent, whether the agency be general or special, to receive in payment of a debt due to her real estate, and take the conveyance to himself individually, instead of to his wife; nor is the wife's debtor justified in accepting the bare word of the husband that his wife has authorized him so to do. Unless she has in fact given such authority, a conveyance by the debtor to the husband will constitute the husband a trustee for the debtor to hold or dispose of the title.—WILLIAMS v. ROBERTS, Ga., 18 S. E. Rep. 545.

68. HUSBAND AND WIFE — Community Property.—Where the undivided half interest of E in a land certificate held by him as community property descended to L and V, a conveyance by the widow and V of an undivided half interest, in consideration of the locating of the land and procuring a patent, was valid without L joining, since the grantors owned a larger interest then they conveyed.—LEMONDS v. STRATTON, Tex., 24 S. W. Rep. 370.

69. HUSBAND AND WIFE—Gift.—A wife can make gift of her separate land to her husband by joining with him in a deed of the land to a third person, and causing such third person to reconvey to her husband.—RILEY v. WILSON, Tex., 24 S. W. Rep. 394.

70. INJUNCTION—Dissolution — Damages.—Code 1892, § 572, providing that 5 per cent. damages shall be allowed on the dissolution of an injunction to "stay proceedings on a judgment for money," or "to stay sales under deeds of trust or mortgages with power of sale," does not authorize the allowance of such damages on the dissolution of an injunction to restrain the confirmation of a sale of land, made under a decree of foreclosure of a trust deed.—FOX v. MILLER, Miss., 14 South. Rep. 145.

71. INJUNCTION — Exemplary Damages.—Exemplary damages cannot be recovered for the malicious suing out of an injunction.—SHACKELFORD COUNTY v. HOUNSFIELD, Tex., 24 S. W. Rep. 358.

72. INJUNCTION—Proceedings at Law.—It is not necessary, in all cases where a temporary injunction is sought in an action, that the plaintiff should ask for a permanent injunction in his complaint. Other equivalent relief may be sought, appropriate to the nature of the case, and it is enough that it be made to appear that the defendant is threatening to do some act in violation of plaintiff's rights, in respect to the subject of the action, and tending to render the judgment ineffectual.—HAMILTON v. WOOD, Minn., 57 N. W. Rep. 208.

73. INSURANCE—Application—Condition.— Where an application for a fire insurance policy on a cotton gin recites that the representations therein contained are the basis on which the insurance is effected, and both the application and the policy expressly state that the representations in the application are warranties, and that the insurance shall be void if the insured has made any misrepresentations, the failure of the insured to keep a barrel of water and two buckets in the same room and within ten feet of the gin stand, as he had agreed to do in the application as a condition of insurance, will bar a recovery for a loss sustained.—SOUTHERN INS. CO. v. WHITE, Ark., 24 S. W. Rep. 425.

74. INTOXICATING LIQUORS—Local Option—Mandamus.—After the precincts of a county had adopted the local option law, the commissioners' court ordered an election for the whole county under the law. At the suit of two liquor dealers, the District Court entered a rule requiring the commissioners to show cause why they should not be prohibited from making any decision as to the result of the election, basing its action on the ground that the election would be void if the electors of said precincts were allowed to vote: Held, that the Supreme Court would not issue a *mandamus* compelling the district judge to vacate his order, thus substituting its judgment for that of the district judge; and especially where there was a right of appeal.—STATE v. MORRIS, Tex., 24 S. W. Rep. 393.

75. JUDICIAL NOTICE—Venue.—Evidence that an offense was committed in a named town, without proving the State or county, is not sufficient proof of venue since judicial knowledge of the location of towns is limited to such places as are recognized by general statute; and, in the absence of such a statute and of evidence, a court cannot know that a named place is in a particular county.— FIELDS v. STATE, Tex., 24 S. W. Rep. 407.

76. LIFE INSURANCE—Application— Estoppel.—When an applicant for life insurance, in answer to a question, states the facts fully and truthfully, and the agent of the company, authorized to ask the question and write the answer, putting his own construction on such facts, deduces therefrom an erroneous answer, which he writes down, assuring the applicant that it is the proper answer upon the facts stated, and the one the insurer wants, the insured is not precluded by his warranty in the application from showing the facts and circumstances under which the answer was made, and when so shown the insurer is estopped from questioning the truth of the answer.—MUTUAL BEN. LIFE INS. CO. v. ROBISON, U. S. C. C. of App., 58 Fed. Rep. 723.

77. LIMITATIONS OF ACTIONS — New Promise. — The agent of the payee of a note which was almost barred by the statute of limitations wrote to the maker, demanding payment of such note, and of another note held for collection by such agent. The maker wrote in reply that "I propose to settle both of your claims the first of next month, which I hope will be agreeable." He never owed such payee any debt except such note:

Held, that the maker's letter was such a promise as prevented the bar of the statute as to the former note, under Code, § 172, requiring such promise to be contained in some writing signed by the party to be charged thereby.—TAYLOR v. MILLER, N. Car., 18 S. E. Rep. 504.

78. LOST INSTRUMENTS—Possession.—In an action on a note made by his father-in-law, payable to plaintiff's order, and not indorsed by him, but taken from his possession, and claimed by his wife, the jury having found plaintiff's ownership, it is no hardship to defendant to permit plaintiff to recover on giving indemnity, as provided in cases of lost notes.—HOIL v. RATHBONE, Mich., 57 N. W. Rep. 183.

79. MALICIOUS PROSECUTION.—In the absence of satisfactory and clear proof of malice, and want of probable cause for the prosecution, no recovery can be had for indemnity, both being the essential ingredients of a malicious prosecution.—GARNIER v. BERNARD, La., 14 South. Rep. 189.

80. MANDAMUS — Assignment of Dower. — *Mandamus* will not lie against a probate judge to compel the appointment of commissioners to lay off dower, the remedy being by appeal.—PULLING v. DURFEE, Mich., 57 N. W. Rep. 187.

81. MASTER AND SERVANT—Contributory Negligence. —A brakeman who wilfully and unnecessarily violates a reasonable precautionary rule, known to him, or which he must be taken to have know, cannot recover for an injury, of which such violation of the rule is the direct, efficient cause.—JOHNSON v. CHESAPEAKE & O. RY. CO., W. Va., 18 S. E. Rep. 573.

82. MASTER AND SERVANT—Dangerous Appliances.—A railroad company having erected on its right of way a derrick which, under certain conditions, was dangerous, it was its duty to see that it was properly taken care of, and, for any injury directly resulting from such derrick being negligently left in condition to cause damage, the company is primarily or presumptively liable.- GATES v. CHICAGO, M. & ST. P. RY. CO., S. Dak , 57 N. W. Rep. 200.

83. MECHANIC'S LIEN—Parties. — In an action by a subcontractor to enforce a lien against a building for which he has furnished materials, the contractor is a necessary party.— ESTEY v. HALLACK & HOWARD LUMBER CO., Colo., 34 Pac. Rep. 1113.

84. MECHANIC'S LIENS — Electric Lighting Plant. — Materials furnished for the construction of an electric lighting apparatus, railway, and power house are not within the provision of the general lien law of Ohio, giving a right to a lien for machinery or materials furnished for "erecting, repairing or removing a house or other structure." — INDUSTRIAL & MINING GUARANTY CO. v. ELECTRICAL SUPPLY CO., U. S. C. C. of App., 58 Fed. Rep. 732.

85. MORTGAGE—Life Estate.—Under the provision of section 17, ch. 36, Comp. St., if the homestead was selected from the separate property of either husband or wife it vests on the death of the person from whose property it was selected in the survivor for life, and afterwards in his or her heirs, forever, etc. This life estate the survivor may mortgage, and the purchaser under the decree of foreclosure will acquire the life estate.—NEBRASKA LOAN & TRUST CO. v. SMASSALL, Neb., 57 N. W. Rep. 167.

86. MORTGAGE ON FIXTURES.—As a boiler and engine, with the shafting and pulleys appurtenant thereto are personalty, in that they are movable, the county court has jurisdiction of an action to foreclose a mortgage on such machinery, executed by the owner thereof to secure the payment of a note.—AMES IRON WORKS v. DAVENPORT, Tex., 24 S. W. Rep. 369.

87. NUISANCE—Joinder of Causes.—A cause of action for injuries resulting from noxious vapors from a cesspool or stagnant water suffered to remain on his premises by the owner, in an excavation thereon made by him, may be united with one for damages from depositing dirt or rubbish removed from such excavation, and deposited in the street in front of the adjoining premises.—ALDRICH v. CITY OF MINNEAPOLIS, Minn., 57 N. W. Rep. 221.

88. NUISANCE — Obstruction of Highway.—Where a railway company takes and occupies a part of a county road without having condemned it, yet with the consent of the county court duly given, but on the condition that the company shall restore the county road to its former state, or to such state as will not unnecessarily impair its usefulness, and fails to comply with the condition, the railway company may be proceeded against by indictment for maintaining a nuisance, and fined for obstructing and injuring the county road.—STATE v. OHIO RIVER R. CO., W. Va., 18 S. E. Rep. 582.

89. OFFICE AND OFFICERS—Removal.—The governor has no power, under chapter 95 of the Law of 1893, to remove the trustees of the Agricultural College and Experimental Station from office.—STATE v. MILLER, N. Dak., 57 N. W. Rep. 193.

90. PARTITION—Pleadings.—Where the pleadings contain no proper prayer therefor, it is error to decree affirmative relief.—HARRISON v. BREWSTER, W. Va., 18 S. E. Rep. 568.

91. RAILROAD COMPANY — Crossings.—On the issue whether one used proper care, before trying to cross the track, to discover if a train were approaching, it is error to charge that one approaching the track is not bound to stop, and look and listen for trains, before trying to cross; this being, in each case, a question for the jury.—GULF, C. & S. F. RY. CO. v. DANIELS, Tex., 24 S. W. Rep. 337.

92. RAILROAD COMPANIES — Crossing—Negligence.— Where a railway company has recognized and acquiesced in the use of a private wagon crossing over its tracks, and adopted the usual signals therefor on the approach of its trains, it cannot lawfully discontinue the same without notice; and a negligent omission to give them, resulting in an accident, will subject the company to an action.—WESTAWAY v. CHICAGO, ST. P. M. & O. RY. CO., Minn., 57 N. W. Rep. 222.

93. RES JUDICATA—Identity of Issues.—A verdict and judgment are conclusive in a subsequent suit between the same parties only when the controversy is the same in both suits, and the matter in issue in the second suit was directly, and not collaterally or inferentially, decided in the first one.—FAIRES v. MCLELLAN, Tex., 24 S. W. Rep. 365.

94. SALE — Conditional Sale.—Defendant bought a harvesting machine called a "binder," upon the condition that if it did not work to his satisfaction he might return it: Held, that his right to reject was absolute, and his reasons could not be investigated.—D. M. OSBORNE & CO. v. FRANCIS, W. Va., 18 S. E. Rep. 591.

95. SALES—Representations.—In an action by a buyer to cancel the sale on account of false representations made by the seller's agent, evidence of such representations is not inadmissible on the ground that they vary or contradict the bill of sale.—HALSELL v. MUSGRAVES, Tex., 24 S. W. Rep. 355.

96. SALE—Warranty.—A breach of warranty may be the subject of counterclaim, or it may be set up as a defense by way of recoupment, in an action for the purchase price of property sold with warranty.—C. AULTMAN & CO. v. TORREY, Minn., 57 N. W. Rep. 211.

97. SALE TO INSANE PERSON. — Where, in an action for a balance due on goods sold, it appears that the prices charged were excessive, that defendant bought and partly paid for the goods while insane, and that plaintiffs knew his condition, defendant may recover what was paid by him in excess of the value of the goods, for the fact that he was insane would invalidate the payment made by him as a contract of settlement. —WEIS v. AHRENBECK, Tex., 24 S. W. Rep. 356.

98. SCHOOL DISTRICTS — Building Contract. — Under section 45, ch. 45, of the Code, the value of a school

house and site yet unsold, though the board of education intends to sell it, cannot be taken into consideration, in estimating, for contracts and expenditures, the amount of money available in the fiscal year for contracts and expenditures. — DAVIS V. BOARD OF EDUCATION OF FT. SPRING DIST., W. Va., 18 S. E. Rep. 588.

99. TAXATION—Assessment. — Section 4, ch. 36, Acts 1891, providing for the reassessment of lands where it mentions coal privileges or interests held by a party or parties or any company or association, exclusive of the surface, and providing for a separate assessment of the surface and coal privilege or interest, in using the word "held" meant and intended "owned" by such party or parties or any company or association.—UNITED STATES COAL, IRON & MANUF'G CO. V. RANDOLPH COUNTY COURT, W. Va., 18 S. E. Rep. 567.

100. TAXATION—Equalization.—Though the proceedings of a county board be fatally defective as to equalization, apportionment, and levy of county taxes, the board's further failure to examine the certificates and papers required to be submitted to them by townships, showing the amount to be raised therein, does not invalidate said township taxes, unless the taxpayer can show that he has been denied a hearing thereon by the board. — AUDITOR GENERAL V. HILL, Mich., 57 N. W. Rep. 168.

101. TENANCY IN COMMON—Sale of Timber by Cotenant. —A conveyance by a tenant in common of his undivided interest in the timber growing on the premises is valid as between the parties, but cannot be permitted to affect injuriously the rights of the other cotenants; and the grantee may resort to a court of equity to compel his grantor to institute partition proceedings, as to the land, against his cotenants, and, when the partition is made, the grantee is entitled to the timber growing on the parcel awarded his grantor.—MEE V. BENEDICT, Mich., 57 N. W. Rep. 175.

102. TENDER.—A contract under which plaintiff executed his note to defendants, on the faith of a promise by them to transfer to him certain horses if he was compelled to pay it, does not prevent defendants from transferring the note, and, after it has been so transferred, a tender of payment by plaintiff to defendants gives him no right to the horses.—BURNS V. TRUE, Tex., 24 S. W. Rep. 338.

103. TRESPASS TO TRY TITLE.—Defendant is not precluded from recovering for improvements by the fact that his answer is found to have misdescribed the land on which they were made; such misdescription being based on his theory as to his boundary, which is the main question at issue in the suit, unless it appear that his mistake was the result of negligence.—BUTTS V. CAFFALL, Tex., 24 S. W. Rep. 373.

104. TROVER AGAINST SHERIFF. — Where a sheriff is sued in trover after levy under attachment or execution upon property claimed by the plaintiff in the suit, and upon the sheriff's application, pursuant to chapter 66, § 155, Gen. St., an order is made directing the obligors in an indemnity bond executed to him under section 154 to be impleaded with him, it is not necessary for the plaintiff to amend his complaint by setting up facts showing the nature of their liability as indemnitors of the sheriff. That is for the sheriff to do in his answer.—RICHARDSON V. MCLAUGHLIN, Minn., 57 N. W. Rep. 210.

105. TOWNS—Powers.—Since a contract to construct a levee is without the scope of corporate powers conferred on incorporated towns, such contract cannot be ratified by the town's acceptance of the work done under it, nor can the town be estopped by permitting the work to be done, and accepting the benefit thereof.—TOWN OF NEWPORT V. BATESVILLE & B. RY. CO., Ark., 24 S. W. Rep. 427.

106. TRUSTS—Constructive Trust.—Where a son in-law, after inducing his wife's mother to buy land and erect buildings, fraudulently has the deed made to his wife, and then insists that the property was an advancement to her a constructive trust will be decreed in favor of the mother.—GRAHAM V. KING, Ky., 24 S. W. Rep. 430.

107. USURY—Promissory notes, given when there was no statute on the subject of usury, and no limit as to the amount of interest are not usurious, no matter how much past interest or usury was embraced in them as a part of the principal. If the debt was good and valid as to the principal, and was mature at the time the notes were given, and by the notes the day of payment was postponed, this postponement was a sufficient consideration, both for the interest and usury embraced as a part of the principal, and for future interest at the rate expressed in the face of the notes.—NEAL V. REYNOLDS, Ga., 18 S. E. Rep. 530.

108. VENDOR AND PURCHASER — Contract.—Plaintiff sold defendant land, and took his notes for the purchase money, under a written contract by which he agreed to execute a good deed when the notes should be paid. After all the notes had become due, he sued on them, but did not show that he had made or tendered a deed: Held, that the making of the notes and contract was on transaction, and a verdict was properly directed for defendant because of plaintiff's failure to perform.—UNDERWOOD V. TEW, Wash., 34 Pac. Rep. 1100.

109. VENDOR AND PURCHASER—Contract for Title.—A vendor who has agreed in writing to make title in 30 days may show that the same day the vendee orally agreed to accept his bond for title instead.—COOKE V. COOK, Ala., 14 South. Rep. 171.

110. VENDOR AND PURCHASER.—Where parties by mistake convey land to which they have no title, the measure of damages ordinarily is the consideration paid and interest thereon. The expenses of the vendee for railway fare and hotel bills while attempting to make a settlement with the vendors cannot be properly included in the damages allowed against the vendors.—DOOM V. CURRAN, Kan., 34 Pac. Rep. 1118.

111. VENDOR AND VENDEE—Agreement.—A contract between defendant and D provided that defendant should furnish money for the purchase and improvement of lands, and that D should make the purchases, and get the land in condition for sale; that title should be taken in defendant's name, as trustee for himself and D; and that the profits should be shared in specified proportions: Held, that an interest in all lands purchased and improved by D under the contract vested in him, and was alienable.—CROSBY V. COTTON, Tex., 24 S. W. Rep. 343.

112. VENDOR'S LIEN—Enforcement.—Though, generally, the beneficiary in such deed of trust, as it is subsequent, need not be a party, yet if there be a question whether the holder of the vendor's lien has by his act waived his lien as to the debt secured by the trust, the beneficiary is a necessary party.—TURK V. SKILES, W. Va., 18 S. E. Rep. 561.

113. VERDICT—Amendment.—A verdict finding and declaring a lien upon a part of a railroad is void, and is not amendable at a term of the court subsequent to that at which it was rendered, so as to make it assert a lien upon the whole of the railroad. The verdict not being amendable, a judgment conforming thereto is amendable.—FARMERS' LOAN & TRUST CO. V. CANDLER, Ga., 18 S. E. Rep. 549.

114. WATERS—Riparian Rights—Pollution.—While an upper riparian owner may use the waters of a stream for mining purposes, and, to a certain extent, impair its purity, he may not so pollute it as to render it unfit for the domestic use of a lower riparian owner, or so use it as to fill up the channel, and cause the debris to be deposited on his land.—TENNESSEE COAL, IRON & R. CO. V. HAMILTON, Ala., 14 South. Rep. 167.

115. WILLS—Attestation. — Attesting witnesses to a will must be such as are competent at the date of attestation, and, if then competent, their subsequent incompetency from whatever cause, will not prevent the probate of the will.—IN RE HOLT'S WILL, Minn., 57 N. W. Rep. 219.